the date of the breach of contract by the defendants' repudiation was the 10th March, 1964. I have therefore to consider the evidence as to the market value of this particular property as at March, 1964.

Mr. Kiong Chai Woon, a licensed auctioneer and valuer, was called on behalf of the plaintiff while Mr. Reeve, the chief surveyor and valuer for Cheong Koon Seng & Co. Ltd., auctioneers and appraisers, was called on behalf of the defendants. While both agreed that the value of the property today was $70,000 there was a marked difference of opinion between them as to its value at the 10th March, 1964. Mr. Kiong valued it at $60,000 while Mr. Reeve valued it at $40,000. It is a curious fact that while according to Mr. Kiong the property had only appreciated in value to the extent of $10,000 between March 1964 and March 1966, Mr. Reeve put the figure at $30,000.

Prices paid for comparable property in the neighbourhood are the usual as well as the best evidence as to market value. Mr. Kiong was unable to give me any evidence of sales of comparable property in the neighbourhood but he did refer to properties in Leedon Park and Orchard Road which in my view cannot be compared with and bear no resemblance to the one in question.

Mr. Reeve, on the other hand, who has served in the offices of Government Valuer, Deputy Chief Valuer and Chief Valuer Singapore during the period March 1951 to December 1964 said he had a definite recollection of the development of Holland Heights Estate and the erection of the houses there including the one in question. His opinion was that the price as originally quoted of $37,900 would not have been unreasonable as at the 10th March, 1964.

That evidence is supported by reference to actual sales of comparable property in the neighbourhood for $37,000 as at December 1964 supplied by Mr. Guok.

Taking into account all the various factors and circumstances and having considered the evidence in detail I am forced to the conclusion that Mr. Kiong's estimate of the market value of this property and the cost per square foot at the material time are unrealistic.

I think a fair and reasonable market value for this property in March 1964 would be somewhere in the region of $40,000. The difference between this figure and the purchase price is accordingly $2,100 which the plaintiff is entitled to recover.

There must, therefore, be judgment for the plaintiff for $2,100 and costs.

Judgment for the plaintiff.

Solicitors: *R. C. H. Lim & Co.; L. A. J. Smith.*

PUBLIC PROSECUTOR v. KHONG SOH

[A.Cr.J. (MacIntyre J.) April 7, 1966]

[Ipoh — Criminal Appeal No. 14 of 1965]

Penal Code, s. 392 — Robbery — Finding of fact by trial judge — Power of Appeal Court to reverse it — Trial judge misdirecting himself on degree of proof — Proof beyond reasonable doubt.

In this case the president of the Sessions Court had acquitted the respondent as he held that the "petitioner has failed to prove beyond any shadow of doubt that the accused took part in the robbery".

Held: (1) the learned president had misdirected himself on the degree of proof required and therefore in the circumstances the appellate court was entitled to reverse the finding of the learned president, which was based on inferences from the evidence;

(2) on the facts the evidence adduced by the defence far from casting any doubt on the prosecution case had strengthened it and the accused should therefore be convicted.

Cases referred to:—

(1) *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326, H.L.

(2) *Tay Khong Hong* v. *Heap Moh Steamship Co. Ltd.* [1964] M.L.J. 87, P.C.

(3) *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372.

(4) *Liew Kaling and others* v. *Public Prosecutor* [1960] M.L.J. 306, C.A.

CRIMINAL APPEAL.

James Loh (Deputy Public Prosecutor) for the appellant.

M. S. Mahendran for the respondent.

Cur. Adv. Vult.

MacIntyre J.: This is an appeal by the Public Prosecutor against the acquittal of the respondent by the learned president of the Sessions Court at Ipoh on a charge of robbery with some other persons of 2 piculs and 25 katis of tin-ore valued at $850 from one Leong Tee Loong at about 10.30 p.m. on 14th August, 1964, an offence punishable under section 392 of the Penal Code.

According to the evidence, 4 masked men broke into the kongsi house of Leong Tian Tin Mines at the time and date mentioned in the charge, herded the inmates into a room and kept guard over them while another party entered into the store room at the rear of the kongsi house and started to fill in some sacks with tin-ore which was stored there. At about this time the two night watchmen employed by the mine were some 15 chains away from the kongsi house inspecting the palong. Their attention was first drawn to the happenings in the kongsi house by the barking of dogs. They then noticed that the gasoline lamp which was kept in front of the

kongsi house had been removed to the rear. Thereupon they hurried back and when about 50 yards from the kongsi house opened fire with their shotguns at some 10 persons who were seen behaving suspiciously in the store room. On hearing the shots the culprits dispersed and fled.

At about the same time, unknown to the night watchmen, a party of policemen who had earlier received information that a robbery was about to take place at the Leong Tian Tin Mines was lying in ambush about 200 yards away from the kongsi house at a place where the road from the kongsi house formed a junction with two other roads.

After the firing had ceased, the police party saw 3 men come running from the direction of the kongsi house and immediately gave chase. One man was apprehended and he was the respondent, who was found wearing a hankerchief folded triangularly with the two corners knotted behind his neck.

At the trial two of the inmates of the kongsi house testified that the men who kept guard over them had handkerchieves tied round the lower part of their faces in order to conceal their identities. For obvious reason these witnesses were later unable to identify the respondent as one of the robbers.

On investigation by the police a number of empty sacks were found in the store room beside 3 sacks already filled with tin-ore from the tubs in which they were stored.

Shortly after his arrest, the respondent led the police to a rubber estate about ¼ of a mile from the kongsi house and pointed out a bicycle concealed in the bush.

The respondent deposed at the trial that he went to vicinity of the tin mine between 9 and 10 p.m. on the day in question to collect fish from 14 fish traps laid by his father in a stream which flowed past the mine. He further said that he was asked to collect the fish because his father had fallen ill at about 8.30 p.m. on that day. Then while he was in the water and had collected fish from 9 or 10 traps, he heard the sound of gunshots and became alarmed. He had, therefore, waded back to the bank, discarded his wet clothes, put on his dry clothes, threw away the basket with the fish which he had collected and ran for his life but was chased and caught by policemen. In cross-examination he denied at first that he had a handkerchief tied round his neck but quickly corrected himself and said that the handkerchief was tied round his neck for the purpose of carrying cigarettes while in the water.

The respondent's father, giving evidence for the defence, denied that his son owned or possessed a bicycle. He first said that on 14th August, 1964, he had asked the respondent between 8.30 p.m. and 9 p.m. to collect the fish but later changed the time to between 5.30 p.m. and 6 p.m. He also said that the respondent left immediately on foot to collect the fish. But the reason he gave for asking the respondent to collect the fish was because he came back late from work. He also said that a torch light was not necessary to collect the fish and if the respondent had gone straight to the traps when he left the house on foot he should have returned by 8 p.m.

After hearing the defence, the learned president held that the circumstances of the case had raised a reasonable doubt in his mind as to respondent's participation in the crime, although he was satisfied that the prosecution had proved that a robbery had taken place as alleged.

This appeal raises once more the question of the power of an appeal court to reverse a finding of fact by a trial judge. In *Benmax* v. *Austin Motor Co. Ltd.*,[1] the House of Lords drew a distinction between perception of facts and the evaluation of facts and held that an appeal court is in as good a position to evalute the evidence as the trial judge, if the finding of the trial judge was not based on the credibility of witnesses but from inferences drawn from the evidence as a whole. This principle was accepted by the Privy Council in *Tay Khong Hong* v. *Heap Moh Steamship Co. Ltd.*[2]

In his grounds of judgment the learned president says: "Having regard to the circumstantial nature of the prosecution evidence, I find the explanation given by the accused as to his presence at the scene and as to the presence of the hankerchief, has raised a reasonable doubt." He then says: "The prosecution has failed to prove beyond any shadow of doubt that the accused took part in the robbery."

In the first place, it would seem that the doubt in the learned president's mind was based, not on the credibility of the respondent but on the possibility that his evidence may be true in view of the fact that the evidence against him was circumstantial. In the second place, he seems to have thought that the prosecution had to prove their case beyond a "shadow of doubt". On the question of the degree of proof required in a criminal case Denning J. in *Miller* v. *Minister of Pensions* [3] said: "That the degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt." This *dictum* was quoted with approval by Thomson C.J. (as he then was) in *Liew Kaling & Others* v. *Public Prosecutor*.[4]

The learned president also says in his grounds of judgment that there was no direct

evidence to connect the respondent with the crime except for the following circumstances, namely:—

"(1) The accused was caught by the police party about 200 yards away from the scene of the crime.

(2) The accused was found with a handkerchief tied round his neck at the time of the arrests."

However on this very evidence he had held that a *prima facie* case had been made out against the respondent and called for his defence. But there were also other circumstances which suggested the respondent's participation in the crime which the learned president had overlooked or discarded. He had dismissed as being improbable the respondent being seen coming from the direction of the kongsi house by the police party. The evidence in regard to this point was given by police corporal (P.W.4) and police constable (P.W.5). P.W.4 had said in examination-in-chief that he had seen respondent come from the direction of the kongsi house. In cross-examination he had said the following: "The ambush place was not very dark. Visibility was about 10 feet. When I first saw the three persons they were about 20 feet away. They were running from the direction of the kongsi." From this evidence, the learned president concluded that it was "doubtful that the police could be sure that they saw the accused coming from the direction of the kongsi". Now, if the visibility was only 10 feet, the evidence does not explain how the corporal saw the three persons about 20 feet away. The only conclusion I would draw from the evidence is that the corporal saw the three persons coming from the direction of the kongsi when they were 20 feet away but he could not recognise their faces till they were about 10 feet away. But the learned president seems to have entirely overlooked the evidence of P.W.5 who said: "Visibility was about 40 yards that night. The corporal is older. My eye-sight is better than his. Sometimes he wears glasses."

Further the learned president does not seem to have given any consideration to the fact that the respondent was seen running in the company of two other persons which strongly suggests that he was not a lone wolf as he claimed to be but the member of a pack.

The respondent had a handkerchief folded triangularly with the corners tied behind his neck. The learned president seems to have been impressed by the respondent's explanation that the handkerchief was tied in that fashion to hold a packet of cigarettes when the respondent got into the river to collect fish. It does not seem to have occurred to anyone to ask the respondent to demonstrate how a handkerchief tied round his neck in the manner described could have held a packet of cigarettes. If the story is true then it was indeed an extraordinary coincidence that almost immediately before the respondent was seen to run away from the direction of the kongsi house, three or four men who had kept guard over the inmates of the kongsi and who fled when the shots were fired had handkerchieves tied around the lower part of their faces.

Having held that a *prima facie* case had been made out against the respondent, the learned president should have given his reasons for holding why the respondent's evidence had created a reasonable doubt in his mind. I am unable to infer from his grounds of judgment what his reasons were. The respondent did not give any evidence as to visibility which could have discredited the evidence of P.W.4 and P.W.5. He gave no reason why it was necessary to collect the fish in pitch darkness. On this point, the respondent's father had said that he left the house between 5.30 p.m. and 6 p.m. to collect the fish and should have been back home by 8 p.m. He also said there was no need for a torch light to be used in collecting the fish. It would therefore appear that the fish collecting job was normally done by daylight. Yet the respondent said in his evidence contradicting the evidence of his father, that he was asked to collect the fish at 8.30 p.m. Again he did not explain how he came to be in the company of two other persons when caught by the police.

But to my mind the most significant evidence in favour of the prosecution and most damaging to the defence is the failure of the respondent, who had taken the trouble to point out to the investigating officer a bicycle hidden in the bush about quarter of a mile away, to point out to him the existence of such exculpatory evidence as the fish traps in the river, the wet clothes which he had discarded on the river bank, the basket containing the fish which he had thrown away and the packet of cigarettes which he had carried with him. Nor did he attempt to offer any explanation at the trial for his omission to do so. The irresistible inference that I would draw from the conduct of the respondent is, that he failed to point out this exculpatory evidence because it did not exist.

It therefore appears to me that the evidence adduced by the defence, far from casting any doubt on the prosecution case had only strengthened it. If the evidence had raised any doubt in the learned president's mind then the doubt must have arisen because he had misdirected his mind on the degree of proof required of the prosecution and had held that the prosecution must proof their case beyond a shadow of doubt.

The order of acquittal and discharge is therefore set aside and I convict the respondent of the offence charged.

Appeal allowed.

Solicitors: *Mahendran & Co.*